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January 6, 2006

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: April 8, 2005

Case Number: TSO-0229

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (hereinafter "the Individual") for continued access authorization. This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the Individual's suspended access authorization should be restored. For the reasons detailed below, it is my decision that the Individual's access authorization should not be restored.

I. APPLICABLE REGULATIONS

The regulations governing the Individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material."

An individual is eligible for access authorization if such authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). "Any doubt as to an individual's access authorization eligibility shall be resolved in favor of the national security." *Id.* See generally *Dep't. of the Navy v. Egan*, 484 U.S. 518, 531 (1988) (the "clearly consistent with the interests of national security" test indicates that "security-clearance determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990) (strong presumption against the issuance of a security clearance). Thus, the standard for eligibility for a clearance differs from the standard applicable to criminal proceedings in which the prosecutor has the burden of proof.

If a question concerning an individual's eligibility for an access authorization cannot be resolved, the matter is referred to administrative review. 10 C.F.R. § 710.9. The individual has the option of obtaining a decision by the manager at the site based on the existing information or appearing before a hearing officer. 10 C.F.R. §710.21(b)(3). Again, the burden is on the individual to present testimony or evidence to demonstrate that he is eligible for access authorization, i.e. that

access authorization “will not endanger the common defense and security and will be clearly consistent with the national interest.” 10 C.F.R. § 710.27(a).

II. BACKGROUND

The Individual has been employed by a contractor at a DOE facility in a position which requires him to have an access authorization. Based on information provided by the Individual on a Questionnaire for Sensitive Positions (QSP), the Individual was the subject of a Personnel Security Interview (PSI) in April 2004. DOE Exhibit (Ex.) 8; *see also* DOE Ex. 9. During the PSI, the Individual discussed his use of alcohol and various incidents of exhibitionism, one of which resulted in an arrest for evading a police officer in 1984. DOE Ex. 8 at 62-73. Based on the results of the PSI, the Individual was referred to a DOE consultant-psychiatrist (the Psychiatrist) for an evaluation. The Psychiatrist interviewed the Individual and, in August 2004, issued a report.

In his August 2004 report, the Psychiatrist determined that the Individual met the criteria for alcohol dependence and the criteria for exhibitionism set forth in the Diagnostic and Statistical Manual, 4th Ed., Text Revision, published by the American Psychiatric Association (the DSM-IV-TR). DOE Ex. 6 at 16, 17. The Psychiatrist indicated that the illnesses represented conditions which caused or may cause a significant defect in judgment or reliability. *Id.* at 19-20. In determining the steps necessary for the Individual to show adequate evidence of rehabilitation or reformation from alcohol dependence, the Psychiatrist concluded that

As adequate evidence of rehabilitation the subject can do one of the following: (1) Produce documented evidence of attendance at Alcoholics Anonymous (AA) with a sponsor working on the 12 steps at least once a week for a minimum of 100 hours over at least a year’s time and be abstinent from alcohol and all non-prescribed controlled substances for a minimum of two years. [Or] (2) Satisfactorily complete a professionally run alcohol treatment program, either inpatient or outpatient, including aftercare, for a minimum of six months and be abstinent from alcohol and all non-prescribed controlled substances for a minimum of two years.

Any future use of alcohol or non-prescribed controlled substances will be evidence that the subject is no longer showing adequate evidence of rehabilitation.

As adequate evidence of reformation there are two options: (1) If the subject goes through one of the two rehabilitation programs above, then a minimum of two years of abstinence from alcohol and all non-prescribed controlled substances is necessary to show adequate evidence of reformation. [Or] (2) If the subject does not go through one of the two rehabilitation programs above, then a minimum of three years of abstinence from alcohol and all non-prescribed controlled substances is necessary to show adequate evidence of reformation.

Any future use of alcohol or non-prescribed controlled substances will be evidence that the subject is no longer showing adequate evidence of reformation.

Id. at 18-19. With regard to the diagnosis of exhibitionism, the Psychiatrist stated that adequate evidence of rehabilitation or reformation would, at a minimum, consist of participation in a recognized outpatient treatment program for people with similar disorders for one year or attending group therapy with others having similar disorders at least once a week for 1 year or attending a 12-step program once a week for a minimum of 100 hours and for a minimum of one year. After completing one of these treatment programs, the Individual would then have to be evaluated by the Psychiatrist or another psychiatrist to determine the state of his rehabilitation or reformation. *Id.* at 20 n. 37.

In February 2005, the DOE informed the Individual that the Psychiatrist's diagnoses, taken together with the Individual's 1984 arrest and admitted excessive use of alcohol and incidents of exhibitionism, constituted derogatory information that created a substantial doubt as to the Individual's continued eligibility for an access authorization under 10 C.F.R. § 710.8(h) and (j). (Criteria H and J). DOE Ex. 3 (Notification Letter). Upon receipt of the Notification Letter, the Individual requested a hearing in this matter. *See* DOE Ex. 4. The DOE forwarded the request to the Office of Hearings and Appeals (OHA). The OHA Director appointed me to serve as the hearing officer.

A hearing was held in this matter. At the hearing, the Individual represented himself. The Individual offered his own testimony, as well as that of his wife and his supervisor. The local DOE office presented one witness, the DOE Psychiatrist.

III. THE HEARING

The Individual did not dispute the matters giving rise to the Notification Letter. He did, however, dispute the Psychiatrist's diagnosis of exhibitionism. The following is a discussion of the relevant hearing testimony.

A. The Individual's Wife

The Individual's wife testified that the Individual used to drink alcohol everyday but stopped drinking alcohol completely in January 2005. Hearing Transcript (hereinafter "Tr.") at 56-57. She stated that there is alcohol in their home, but that the Individual has not had a problem refraining from drinking it. Tr. at 58, 76. The Individual's wife described a recent incident at a friend's home where the friend tried to give the Individual a glass of wine, but the Individual adamantly refused. Tr. at 77. The Individual's wife stated that she believed the Individual would continue to remain abstinent from alcohol: "I think he feels much better now, and I feel better, and it doesn't seem very difficult for him to stay away from alcohol." Tr. at 69. Regarding the exhibitionism, the Individual's wife stated that she did not believe the Individual wanted other people to see him naked. Tr. at 70. She further stated that she had never seen the Individual naked where someone else could see him and that he does not walk around the house naked with the window blinds or drapes open. Tr. at 63, 73.

B. The Individual's Supervisor

The Individual's supervisor described the Individual as a "very favorable" employee. Tr. at 9. The supervisor stated that he had never seen the Individual be disrespectful of others or "force himself on anyone." Tr. at 11-12.

C. The Individual

The Individual did not dispute the Psychiatrist's diagnosis regarding his use of alcohol. Rather, the Individual stated that after his consultation with the Psychiatrist, he "began to look at things differently." Tr. at 80. The Individual stated

I became aware that my drinking problem was becoming worse with age. I started with beer, moved into wine in my thirties and early forties, and towards my mid-forties started drinking more spirits than I had before. This was not a good pattern, so I wanted to change my life...I put together a lifestyle change. I know that change is something that you can't do at one time...I've put together a lifestyle plan, and my wife has bought into that, and it's to bring balance to my physical, emotional and spiritual life.

Tr. at 81. The Individual stated that he had no desire to drink. He stated, "I'm very happy with my sobriety. I'm very happy with exercising six days a week, losing weight, and feeling much better about myself." Tr. at 82; *see also* Tr. at 90. The Individual added that his wife is very supportive and that their marriage has become stronger since he stopped drinking. Tr. at 82-83. The Individual stated that he evaluated by another psychiatrist (Individual's Psychiatrist) who informed the Individual that he was not suffering from exhibitionism. Tr. at 83. The Individual also attended an eight-week class on addictive behaviors. *Id.* at 83-84. He also added that he did not want to drink alcohol again because he knew that if he resumed drinking alcohol, it would be some time before he could stop again and, he added, "I don't want to go there." *Id.* at 83. The Individual concluded, "I have no desire to drink. I have no cravings to drink. I have no wants, no nothing for alcohol at all ever again." Tr. at 92.

Regarding the diagnosis of exhibitionism, the Individual stated that after his 1984 arrest, he had no desire to be naked outdoors. Tr. at 84. The Individual also stated that he was a very quiet person who did not force himself on people. Tr. at 91-92. He further stated,

[Twenty] years ago, I was young and stupid and did things stupid [sic]. I'm 44 now. No one wants to see a 44-year old man running around naked. I know that as well as anybody else. I know what I can do in my house and what I can do in public. That's why all this time I've not had any other troubles with the law, speeding tickets, alcohol issues, as far as DUIs, domestic violence, public disturbance. I've never been asked to leave an establishment in my life. I know what I have to do. I know where I can do it.

Tr. at 92. He also testified that when he lets his dog out while nude he does not stand inside the door. Tr. at 50. The Individual also challenged the characterization of one of his responses given

during the Psychiatrist's interview. Specifically, in response to the Psychiatrist's assertion that the Individual stated "I'm sure they have" when asked if the neighbors had seen him nude, the Individual testified that what he meant to convey was his belief that that after 12 years in living at his current residence there was a chance that his neighbors may have seen him naked. Tr. at 50-51.

D. The Psychiatrist

The Psychiatrist gave testimony at the start of hearing and again after listening to all the testimony at the hearing. In his initial testimony, the Psychiatrist stated that, after his evaluation of the Individual, he diagnosed the Individual as a user of alcohol habitually to excess and alcohol dependent based on the criteria set forth in the DSM-IV-TR. Tr. at 16. The Psychiatrist added that, during the evaluation, the Individual appeared to minimize the effect alcohol had on him. Tr. at 18. The Psychiatrist discussed what would be necessary to establish adequate evidence of rehabilitation and reformation. He believed that adequate evidence would be a showing that the Individual had attended an AA program, working the twelve steps of the program with a sponsor, or attended a professional treatment program in addition to maintaining two years of sobriety. Tr. at 21. The Psychiatrist added that with one year of sobriety, in connection with attending AA, the risk of relapse is approximately 30 percent. Tr. at 25. He stated that he did not know the exact percentage of risk for those who did not attend AA, but that the risk of relapse was higher. *Id.* The Psychiatrist also discussed several components of an individual's support system that he considers when giving a prognosis concerning alcohol dependence or abuse. Among those components are

Being in a stable family, having friends and family that are supportive, having a job, having the number of problems that alcohol has caused you be a small number rather than a large number, and he has a very small number. Having the period of time that you have had problems with alcohol be a short period versus a long period.

Tr. at 37. The Psychiatrist stated that he considered those factors in making his recommendation regarding the Individual's treatment. *Id.*

Regarding the Individual's exhibitionism, the Psychiatrist testified that there was a continued risk that the Individual would engage in exhibitionist activities in future. Tr. at 31. He stated, "[m]y opinion is, if you're an exhibitionist, you're always an exhibitionist, and you need some kind of treatment to really learn how to not do that. And [the Individual] really hasn't had any treatment." Tr. at 32.

After listening to the hearing testimony, the Psychiatrist testified again. Regarding the Individual's alcohol dependence, he stated that his diagnosis and recommendation remained unchanged. Tr. at 99. The Psychiatrist stated that the Individual had made significant progress in managing his condition and that he was showing evidence of rehabilitation, but that it was not adequate because of the relatively short period of time in which the Individual was sober.¹ *Id.*

¹ At the time of the hearing, the Individual had maintained his sobriety for nearly seven months. The Psychiatrist stated that seven months was insufficient time to show adequate evidence of rehabilitation. He added that perhaps

The Psychiatrist added, however, that the Individual's relationship with his wife was very significant in that she was extremely supportive of the Individual: "that seems like a very healthy, good relationship, and helping one another, motivating one another, so that's extremely important." Tr. at 103. The Psychiatrist went so far as to say "[s]he might be better than AA." *Id.*

The Psychiatrist also updated his opinion concerning his diagnosis of the Individual as suffering from exhibitionism

You do have, in my opinion, exhibitionism, but it's very mild.

If it were just exhibitionism without the alcohol, I could almost opine that I don't think that might – that it was going to be a problem, but when you mix a disinhibitor with a mild case of exhibitionism that can also be a problem,

So I don't want to change my opinion on that . . . until such time as you're showing adequate evidence of rehabilitation or reformation from alcohol, and then I'd be willing to say at that point your risk for the exhibitionism is probably low enough that it wasn't going to be a concern, given that it's mild.

I've dealt with lots of exhibitionism issues with DOE, and yours is definitely on the very mild end of things. You know, somebody can argue that exhibitionism is a continuum, that everybody has a little bit of it, you know, some people have more and more, and at some point, you draw a line and say that it's an illness, if you have that much. So you're a little bit over the line, in my opinion, but it's mild.

Tr. at 101-02.

IV. STANDARD OF REVIEW

Under Part 710, the DOE may suspend an individual's access authorization where "information is received that raises a question concerning an individual's continued access authorization eligibility." 10 C.F.R. § 710.10(a). After such derogatory information has been received and a question concerning an individual's eligibility to hold an access authorization has been raised, the burden shifts to the individual to prove that "the grant or restoration of access authorization to the individual would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(a).

Derogatory information includes, but is not limited to, the information specified in the regulations. 10 C.F.R. § 710.8. In considering derogatory information, the DOE considers various factors including the nature of the conduct at issue, the frequency or recency of the

one year would be sufficient if the Individual could show that he was actively involved in AA, but the minimal alcohol treatment program the Individual participated in was insufficient to persuade him to change his recommendation that a treatment program plus a two-year period of abstinence was a necessary prerequisite to a finding that the Individual was rehabilitated. Tr. at 99-100.

conduct, the absence or presence of reformation or rehabilitation, and the impact of the foregoing on the relevant security concerns. 10 C.F.R. § 710.7(c). The ultimate decision concerning eligibility is a comprehensive, common sense judgment based on a consideration of all relevant information, favorable and unfavorable. 10 C.F.R. § 710.7(a).

V. ANALYSIS

A. Security Concern

The derogatory information concerning Criteria H and J centers on the Individual's alcohol problem and exhibitionism. Criterion H concerns conduct tending to show that the Individual has "an illness or mental condition of a nature which, in the opinion of a psychiatrist or licensed clinical psychologist, causes or may cause, a significant defect in judgment or reliability." 10 C.F.R. § 710.8(h). Criterion J concerns conduct indicating that the Individual has "been, or is, a user of alcohol habitually to excess, or has been diagnosed by a psychiatrist or a licensed clinical psychologist as alcohol dependent or as suffering from alcohol abuse." 10 C.F.R. § 710.8(j).

It is beyond dispute that a diagnosis of alcohol abuse or dependence raises security concerns. *See, e.g., Personnel Security Hearing, Case No. VSO-0243*, 27 DOE ¶ 82,808 (2002). Similarly, we have found in the past that incidents of exhibitionism by security clearance holders also raise security concerns. *See, e.g. Personnel Security Hearing, Case No. VSO-0084*, 26 DOE ¶ 82,754 (1996). Given the Psychiatrist's diagnosis of the Individual as suffering from alcohol dependence and exhibitionism, the local security office had more than sufficient grounds to invoke Criteria H and J. Thus, the only issue remaining is whether these security concerns have been resolved.

B. Mitigating Factors

1. Alcohol Dependence

The Individual did not dispute that he had an alcohol problem. He testified that he understood that his problem was becoming more serious and that he decided to address it. The Individual stated that he was abstinent from alcohol since January 2005 and I believe he testified honestly and candidly. The Individual established that he has maintained a healthy new lifestyle since he stopped drinking alcohol. He further demonstrated that he has an effective support system in his relationship with his wife. It was clear at the hearing, and the Psychiatrist agreed, that the Individual had made significant strides toward rehabilitation and reformation. However, given the relatively short period of time in which the Individual has been abstinent from alcohol and the fact that he did not undergo an intensive alcohol treatment program, I must agree with the Psychiatrist that there is inadequate evidence of rehabilitation and reformation. Consequently, I am unable to conclude that the Individual has satisfactorily mitigated the security concerns raised by his diagnosis of alcohol dependence.

2. Exhibitionism

After reviewing the evidence, I believe the security concern raised by the Individual's diagnosis of exhibitionism has been mitigated. As an initial matter, the form of exhibitionism at issue in the present case is not the type where a person deliberately seeks to expose himself to strangers but instead is the more common type of exhibitionism where a person seeks to go somewhere where there is the possibility of someone observing him or her naked. Tr. at 48.

In his August 2004 report, the Psychiatrist noted the following conduct by the Individual in making the diagnosis of exhibitionism. The Individual had been arrested in 1984 for evading police after streaking and had admitted that on one occasion before the arrest he had ridden a motorcycle wearing only a tee shirt but no pants or underwear. Ex 6. at 13. He also stated that before the 1984 arrest he would occasionally stand in front of his apartment window while nude while other people driving by his house could observe him. *Id.* With regard to his recent behavior, the Psychiatrist noted that the Individual told him that he likes to walk around his house naked and on occasion the windows and drapes would be open. *Id.* The Individual also informed the Psychiatrist that he would let his dog in the house occasionally while nude. When the Psychiatrist asked if his neighbors had seen him nude while letting in the dog the Individual replied, "I'm sure the neighbors have seen me." *Id.* The Individual also stated that while in the mountains he would sometimes take off his clothes. The Individual stated that on such occasions no one had ever seen him. *Id.*

The Individual confirmed in his testimony that he admitted to the DOE Psychiatrist that he does like to walk around his house in the nude with his wife and that he believed that his neighbors may have possibly seen him nude when he let his dog out of the house while standing inside his house. However, the Individual submitted photographs of the view from his house. Ind. Ex. F. These photographs seem to indicate that there is a very limited view where the Individual's neighbors could observe the Individual when he lets his dog into his back yard while standing inside the house. The Individual's wife testified that she was more likely to let the dog out while nude than her husband. Tr. at 74. Further, she has never seen him go outside the house while not wearing clothes. *Id.* at 74. ²

Given the lack of recent substantial incidents of the Individual creating the opportunity for others (other than his wife) to see him naked, I believe that the security concern raised by the DOE Psychiatrist diagnosis has been mitigated. ³ However, in making this finding, I realize that an exhibitionist may have a great number of "incidents" before he may be noticed or reported. Further, I do not challenge the DOE Psychiatrist's opinion that an exhibitionist with an alcohol problem may lose his inhibitions and engage in exhibitionist activities. Nevertheless, a significant number of years have elapsed since the motorcycle and streaking incidents. Further, the evidence indicates that the Individual does not leave the house naked or give his neighbors

² The record also contains a written evaluation from the Individual's Psychiatrist who did not diagnose the Individual as suffering from exhibitionism. Ex. C. The evaluation records that the Individual informed this psychiatrist that he had been arrested "20 years ago" for streaking and that he and his wife "still, as a matter of habit in their house, tend not to wear any clothes." Ex. C at 2. The evaluation also reports that the Individual stated that he never is nude outside the house, nor has he exhibited himself to an unsuspecting stranger. *Id.*

³ As an initial matter, I note that individuals being nude in the privacy of their own house does not in itself raise a security concern.

the opportunity to see him nude. This finding is supported by his wife's testimony. There is also a lack of documented public incidents involving the authorities during the 20-year period after the 1984 arrest, despite the fact that for a significant portion of this time the Individual suffered from an untreated alcohol problem. Given this evidence and the DOE Psychiatrist's opinion that the Individual has a "mild" case of exhibitionism, I am convinced that the risk that Individual will recklessly or deliberately give others the opportunity to see him without clothes and thus give others a chance to blackmail or coerce him is low. Consequently, I believe the security concern regarding the Individual's diagnosis of exhibitionism has been mitigated.

VI. CONCLUSION

As explained above, while I find that the security concerns related to the Individual's diagnosis of exhibitionism have been mitigated, I also find that the Individual has yet not resolved the security concerns cited in the Notification Letter relating to his alcohol problem. Therefore, I cannot conclude that restoring the Individual's access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Consequently, the Individual's access authorization should not be restored.

Richard A. Cronin, Jr.
Hearing Officer
Office of Hearings and Appeals

Date: January 6, 2006